

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JOLENE R. HAYWARD O/B/O DLRH,

Plaintiff,

v.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,

Defendant.

No. 11-CV-061-JPH

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec.19, 26.) Attorney Maureen J. Rosette represents plaintiff; Special Assistant United States Attorney Stephanie Lynn F. Kiley represents defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** defendant's Motion for Summary Judgment and **DENIES** plaintiff's Motion for Summary Judgment.

**JURISDICTION**

Jolene R. Hayward protectively filed for supplemental security income (SSI) on behalf of DLRH, a minor (plaintiff), on July 15, 2008. (Tr. 83, 86.) Plaintiff alleged an onset date of January 1, 2002. (Tr. 83.) Benefits were denied initially and on reconsideration. (Tr. 43, 52.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was held before ALJ Paul T. Hebda on September 30, 2010. (Tr. 356-403.) Plaintiff was represented by counsel and testified at the hearing. (Tr.358-71.) Plaintiff's mother, Jolene (Hayward) Lloyd, and medical expert Margaret Moore, Ph.D., also testified. (Tr. 372-403.) The ALJ denied benefits (Tr. 15-29) and the Appeals Council denied review. (Tr. 1.) The

1 matter is now before this court pursuant to 42 U.S.C. § 405(g).

## 2 **STATEMENT OF FACTS**

3 The facts of the case are set forth in the administrative hearing transcripts, the ALJ's decision, and  
4 the briefs of plaintiff and the Commissioner, and will therefore only be summarized here.

5 Plaintiff was 14 years old and was in the eighth grade at the time of the hearing. (Tr. 358.) She  
6 attended an alternative school. (Tr. 358.) She has an individualized educational plan (IEP). (Tr. 359.)  
7 Plaintiff testified she has problems in school because she cannot be around a lot of people. (Tr. 359.) She  
8 likes to fight other girls and prefers to hang out with boys. (Tr. 359.) She takes medications to help her  
9 sleep. (Tr. 360.) She has problems controlling her anger and has been violent with other kids and her  
10 mom. (Tr. 360.) She testified she needs extra assistance with assignments at school. (Tr. 362.) The  
11 previous year she missed a lot of school because she did not like going. (Tr. 364.) She was suspended and  
12 would not do her work and would get behind. (Tr. 364.) She did not do homework because she did not  
13 think she should. (Tr. 364.) She does not like school because the work is too hard. (Tr. 366.) However,  
14 she has been doing better in school this year. (Tr. 366-67.) Plaintiff testified school is easier this year and  
15 she likes it better because she has not missed as many days and she has been getting her work done. (Tr.  
16 367-68.) One of her teachers suggested plaintiff join the leadership program at school. (Tr. 370.)

17 Plaintiff's mother testified she believes plaintiff self-medicates with marijuana and alcohol. (Tr.  
18 372.) She also testified plaintiff's behavior at school has been better but there still have been incidents.  
19 (Tr. 373.) She testified there is a distinct difference when plaintiff is on her medication and when she is  
20 not on her medication. (Tr. 373.) However, plaintiff is still irritable even when she is on the medication.  
21 (Tr. 382.) Plaintiff's mother testified plaintiff has difficulty making friends because of her temper and  
22 because she acts mean and violent. (Tr. 376.) According to plaintiff's mother, plaintiff is at a fourth grade  
23 level in school. (Tr. 379.)

## 24 **STANDARD OF REVIEW**

25 Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C.  
26 § 405(g). A Court must uphold the Commissioner's decision, made through an ALJ, when the  
27 determination is not based on legal error and is supported by substantial evidence. *See Jones v. Heckler*,  
28 760 F. 2d 993, 995 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F. 3d 1094, 1097 (9<sup>th</sup> Cir. 1999). "The

[Commissioner's] determination that a claimant is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

It is the role of the trier of fact, not this Court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the Court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Sec'y of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). Thus, if there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a finding of either disability or nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9<sup>th</sup> Cir. 1987).

### SEQUENTIAL PROCESS

On August 22, 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 105 which amended 42 U.S.C. § 1382c(a)(3). Under this law, a child under the age of eighteen is considered disabled for the purposes of SSI benefits if "that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 1382(c)(3)(C)(i)(2003).

1 The regulations provide a three-step process to determine whether a child is disabled. First, the  
2 ALJ must determine whether the child is engaged in substantial gainful activity. 20 C.F.R. § 416.924(b).  
3 If the child is not engaged in substantial gainful activity, the analysis proceeds to step two. Step two  
4 requires the ALJ to determine whether the child's impairment or combination of impairments is severe.  
5 20 C.F.R. § 416.924©. The child will not be found to have a severe impairment if it constitutes a "slight  
6 abnormality or combination of slight abnormalities that cause no more than minimal functional  
7 limitations." *Id.* If, however, there is a finding of severe impairment, the analysis proceeds to the final  
8 step, which requires the ALJ to determine whether the impairment or combination of impairments "meet,  
9 medically equal or functionally equal" the severity of a set of criteria for an impairment in the listings.  
10 20 C.F.R. § 416.924(d).

11 The regulations provide that an impairment will be found to be functionally equivalent to a listed  
12 impairment if it results in extreme limitations in one area of functioning or marked limitations in two  
13 areas of functioning. 20 C.F.R. § 416.926a(a). To determine functional equivalence, the following six  
14 broad areas of functioning, or domains, are considered: acquiring and using information, attending and  
15 completing tasks, interacting and relating with others, moving about and manipulating objects, caring for  
16 self, and health and physical well-being. 20 C.F.R. § 416.926a.

### 17 ALJ'S FINDINGS

18 At step one of the sequential evaluation process, the ALJ found plaintiff did not engage in  
19 substantial gainful activity since July 15, 2008, the application date. (Tr. 18.) At step two, the ALJ found  
20 plaintiff has the following severe impairment: oppositional defiant disorder. (Tr. 18.) At step three, the  
21 ALJ found plaintiff does not have an impairment or combination of impairments that meets or medically  
22 equals one of the listed impairments in 20 C.F.R. Part 404, Subpt. P, App. 1. (Tr. 22.) The ALJ then  
23 determined plaintiff does not have an impairment or combination of impairments that functionally equals  
24 a listing. (Tr. 22.) As a result, the ALJ concluded plaintiff has not been disabled, as defined in the Social  
25 Security Act, since July 15, 2008, the application date.

## ISSUES

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Specifically, plaintiff asserts: (1) plaintiff has an impairment or combination of impairments that functionally equals a listing; and (2) the ALJ did not properly consider or reject the opinions of treating sources.(ECF No. 20 at 5-8.) Defendant argues the ALJ: (1) reasonably concluded plaintiff's impairment does not cause any marked or extreme limitations; and (2) reasonably gave weight to medical source opinions. (ECF No. 27 at 12-22.)

## DISCUSSION

### 1. Opinion Evidence

Plaintiff argues the ALJ did not properly consider or reject the opinions of treating psychologist, Dr. Kiernan, and treating psychiatrist, Dr. Emch. (ECF No. 20 at 6-8.) In disability proceedings, a treating physician's opinion carries more weight than an examining physician's opinion, and an examining physician's opinion is given more weight than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). If the treating or examining physician's opinions are not contradicted, they can be rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the opinion can only be rejected for "specific" and "legitimate" reasons that are supported by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9<sup>th</sup> Cir. 1995). Historically, the courts have recognized conflicting medical evidence, the absence of regular medical treatment during the alleged period of disability, and the lack of medical support for doctors' reports based substantially on a claimant's subjective complaints of pain as specific, legitimate reasons for disregarding a treating or examining physician's opinion. *Flaten v. Secretary of Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9<sup>th</sup> Cir. 1995); *Fair*, 885 F.2d at 604.

#### a. Dr. Emch

Plaintiff began seeing Dr. Emch, a psychiatrist, in July 2008. (Tr. 295.) He indicated diagnoses of bipolar disorder and ADHD. (Tr. 295.) In 2008 and 2009, Dr. Emch monitored and adjusted plaintiff's medications. (Tr. 295-96, 304, 314, 318-25.) In March 2009, he noted that when plaintiff was compliant with medication, she does quite well. (Tr. 319.) Dr. Emch completed an Individualized Functional Assessment and Case Summary form on October 7, 2009. (Tr. 348-50.) Dr. Emch identified no

1 limitations in the areas of communicative development/function and motor development; moderate  
2 limitations in the areas of cognitive development/function and concentration, persistence and pace; and  
3 marked limitations in the areas of social development and personal/behavioral development/function. (Tr.  
4 348-49.) Dr. Emch again noted that when plaintiff is on her medications, she does reasonably well and  
5 her mood stabilizes. (Tr. 350.)

6 The ALJ summarized Dr. Emch's records and cited Dr. Emch in support of his conclusions. (Tr.  
7 19-22, 24.) The ALJ pointed out that Dr. Emch noted "much of [plaintiff's] behavior is inappropriate but  
8 very volitional." (Tr. 24, 322.) The ALJ also cited Dr. Emch's Individualized Functional Assessment form  
9 favorably, specifically noting its consistency with the opinion of the medical expert, Dr. Moore, that  
10 plaintiff does much better when compliant with medications. (Tr. 24.) Thus, the ALJ perceived Dr.  
11 Emch's form opinion to be consistent with his finding and did not provide any reasons for rejecting Dr.  
12 Emch's opinion.

13 Plaintiff asserts Dr. Emch opined plaintiff had several limitations which would render plaintiff  
14 to functionally equal the listing. (ECF No. 20 at 8.) Although plaintiff's argument is not developed and  
15 is unclear, presumably plaintiff means to suggest the two marked limitations assessed on Dr. Emch's  
16 Individualized Functional Assessment form are equivalent to two marked limitations in the functional  
17 areas set forth in 20 C.F.R. § 416.926a. However, the form completed by Dr. Emch lists six categories  
18 of development, but these categories are not defined or explained and they do not appear to directly  
19 correspond to the functional areas listed in the regulations. (Tr. 348-50.) As a result, the marked  
20 limitations assessed by Dr. Emch on the Individualized Functional Assessment form do not necessarily  
21 translate to an assessment of marked limitations in two functional areas listed in the regulations.  
22 Furthermore and more importantly, the ALJ reasonably considered Dr. Emch's opinion that plaintiff's  
23 limitations are reduced by compliance with medication. This is supported by Dr. Emch's office visit notes  
24 as well as his narrative comments on the assessment. (Tr. 319, 322, 350.) The ALJ reasonably concluded  
25 Dr. Emch's opinion supports the findings and thus, the ALJ did not err in failing to reject Dr. Emch's  
26 opinion.

1           **b.       Dr. Kiernan**

2           Dr. Kiernan provided counseling and therapy for plaintiff in 2007 and 2008.<sup>1</sup> (Tr. 281-93, 306-07.)  
 3 He diagnosed ADHD, oppositional defiant disorder and episodic mood disorder. (Tr. 293.) On October  
 4 19, 2009, Dr. Kiernan completed an Individualized Functional Assessment and Case Summary form. (Tr.  
 5 351-53.) In three functional categories, Dr. Kiernan assessed less than moderate or no evidence of  
 6 limitations. (Tr. 351.) However, in the categories of social development/function, personal/behavioral  
 7 development/function, and concentration, persistence and pace, Dr. Kiernan assessed limitations of  
 8 “moderate to marked.” (Tr. 352.) He noted the limitations in those three functional categories were  
 9 “depending on response to medication and other treatment.” (Tr. 352.) He also opined that plaintiff’s  
 10 diagnoses “are significant for concerns in regulation of emotion, socialization, academics and  
 11 occupational functioning. She will most probably require multidisciplinary therapy and support long  
 12 term.” (Tr. 353.)

13           The ALJ summarized Dr. Kiernan’s records for 2007 and 2008 but did not mention the  
 14 Individualized Functional Assessment form completed on October 19, 2007. (Tr. 19-20.) Plaintiff asserts  
 15 Dr. Kiernan’s assessment form was “completed and submitted on October 19, 2009” (ECF No. 20 at 7),  
 16 four days before the ALJ’s October 23, 2009 decision, yet the ALJ did not mention or assign weight to  
 17 the assessment. However, the ALJ cited Dr. Kiernan’s records favorably, pointing out that Dr. Kiernan  
 18 noted plaintiff was not completing schoolwork due to boredom. (Tr. 24, 307.) The ALJ also found Dr.  
 19 Kiernan’s records are consistent with the testimony of the medical expert, Dr. Moore, which generally  
 20 supports findings that plaintiff does much better when compliant with medication. (Tr. 24.)

21           Dr. Kiernan’s assessment of plaintiff’s limitations as “moderate to marked” in three of the six  
 22 functional categories is not equal to a marked limitation in the functional areas defined in 20 C.F.R. §  
 23 416.926a. First, as discussed, *supra*, the categories on the Individualized Functional Assessment form are  
 24 not defined and it is not clear that those categories correspond to the six functional areas mentioned in  
 25 the regulations. Second, a “moderate to marked” limitation suggests a limitation that is less than marked,  
 26 consistent with the ALJ’s findings that any limitations are less than marked. Third, Dr. Kiernan’s

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27           <sup>1</sup>Plaintiff’s pediatrician, Dr. Lubner, noted in July 2007 that Dr. Kiernan “has provided a  
 28 psychological evaluation report” (Tr. 275), but that report is not part of the record.

1 explanatory notes indicates plaintiff's response to medication and treatment dictates where plaintiff's  
 2 limitations fall on the "moderate to marked" spectrum. (Tr. 352.) This suggests that when plaintiff is  
 3 compliant with medication, her limitations tend toward moderate and when plaintiff is not compliant with  
 4 medication, her limitations tend toward marked. This is consistent with the ALJ's finding that plaintiff  
 5 does better when compliant with medication. (Tr. 24.) Impairments that can be controlled effectively with  
 6 medication are not disabling for the purpose of determining eligibility for SSI benefits. *Warre v. Comm'r*  
 7 *of Soc. Sec. Admin.* 439 F.3d 1001, 1006 (9<sup>th</sup> Cir. 2006). As a result, even if the ALJ erred by failing to  
 8 assign weight to Dr. Kiernan's October 19, 2009 assessment, the assessment is consistent with the ALJ's  
 9 finding and any error is harmless.<sup>2</sup>

## 10 **2. Substantial Evidence**

11 Plaintiff argues there was not substantial evidence to support the ALJ's conclusion and plaintiff  
 12 has an impairment or combination of impairments that functionally equaled the listings. (ECF No. 20 at  
 13 6.) Plaintiff identifies no error in the ALJ's analysis of the functional areas other than the ALJ's  
 14 consideration of Dr. Kiernan's and Dr. Emch's opinions. (ECF No. 20 at 6-9. ) As discussed *supra*, the  
 15 ALJ reasonably interpreted the evidence from Dr. Kiernan and Dr. Emch as supporting Dr. Moore's  
 16 testimony and the ALJ's findings. (Tr. 24, 383-96.) In addition, the ALJ cited other evidence, including  
 17 plaintiff's school records and state reviewing psychological opinions which support the ALJ's  
 18 conclusions. (Tr. 18-24, 212-19, 244-49, 297-302, 308-13.) As a result, substantial evidence supports the  
 19 ALJ's findings and there is no error.

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 25 <sup>2</sup>As long as there is substantial evidence supporting the ALJ's decision and the error does not  
 26 affect the ultimate nondisability determination, the error is harmless. *See Carmickle v. Comm'r, Soc. Sec.*  
 27 *Admin.*, 533 F.3d 1155, 1162 (9<sup>th</sup> Cir. 2008); *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055  
 28 (9<sup>th</sup> Cir. 2006); *Batson v. Comm'r Soc. Sec. Admin.*, 359 F.3d 1190, 1195-97 (9<sup>th</sup> Cir. 2004).

**CONCLUSION**

Having reviewed the record and the ALJ's findings, this court concludes the ALJ's decision is supported by substantial evidence and is not based on error.

Accordingly,

**IT IS ORDERED:**

1. Defendant's Motion for Summary Judgment (**ECF No. 26**) is **GRANTED**.
2. Plaintiff's Motion for Summary Judgment (**ECF No. 19**) is **DENIED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for plaintiff and defendant. Judgment shall be entered for defendant and the file shall be **CLOSED**.

DATED September 26, 2012

S/ JAMES P. HUTTON  
UNITED STATES MAGISTRATE JUDGE